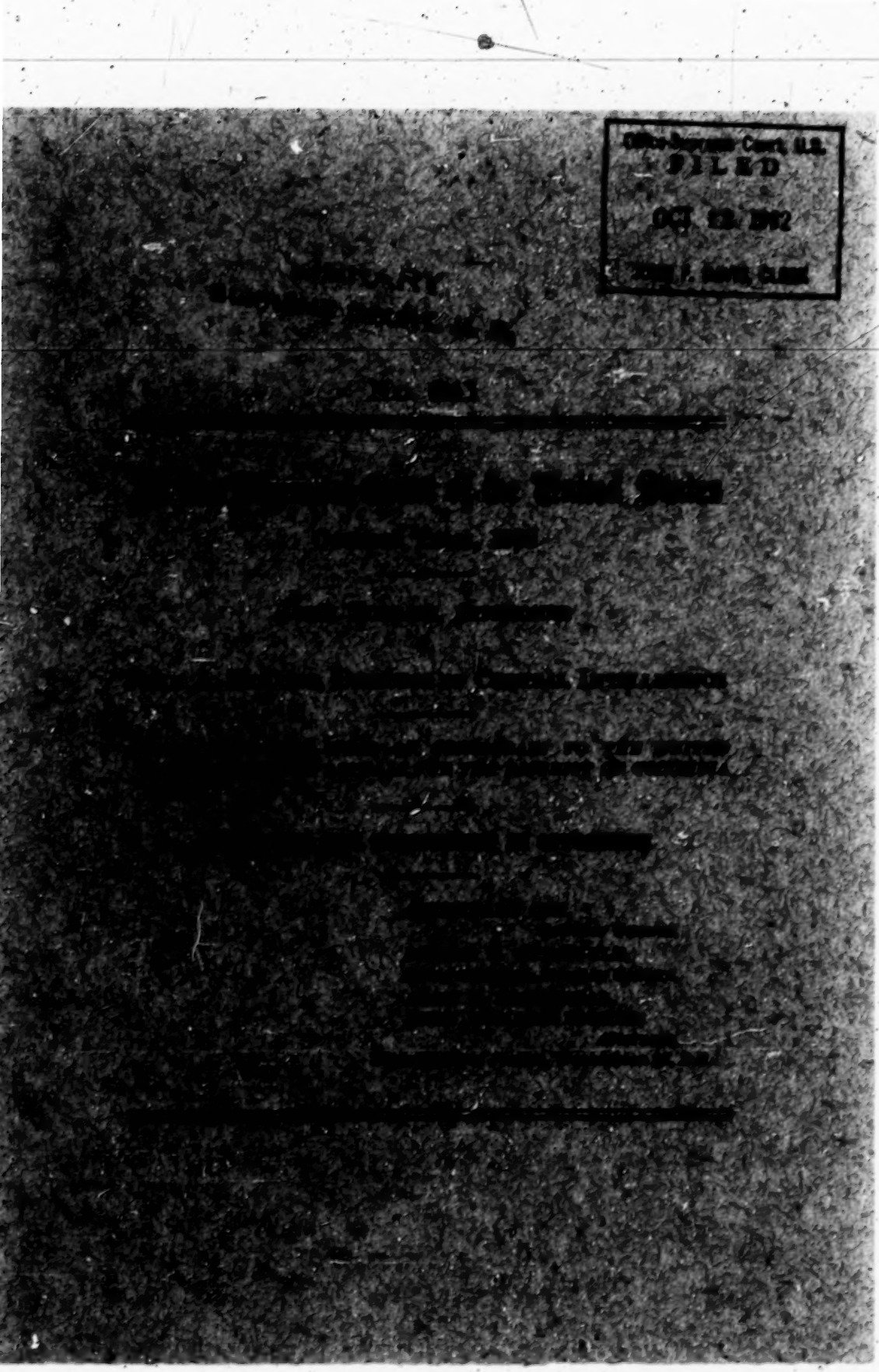
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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 241

JOHN TORPATS, PETITIONER

v.

JOHN A. McCONE, DIRECTOR OF CENTRAL INTELLIGENCE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the United States District Court for the District of Columbia is unreported. The opinion of the Court of Appeals (Pet. App. 1a-3a) is reported at 300 F. 2d 914.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1962. A timely petition for rehearing *in banc* was denied on April 11, 1962. The petition for writ of certiorari was filed on July 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the separation of petitioner from his position in the Central Intelligence Agency was in compliance with the applicable statute and agency regulation.

2. Whether the courts below correctly concluded that there were no genuine issues of material fact.

STATUTE AND REGULATION INVOLVED

Section 102(c) of the National Security Act of 1947, 61 Stat. 498, 50 U.S.C. 403(c), provides as follows:

> (c) Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

CIA Regulation 20-700, dated 8 June 1959 provides in pertinent part as follows:

> SECTION II: INVOLUNTARY SEPARATIONS
>
> 3. STATUTORY POWERS OF THE DIRECTOR OF CENTRAL INTELLIGENCE
>
> The Director of Central Intelligence is empowered to terminate the employment of any Agency employee when he determines that such

action is necessary or advisable in the interests of the United States. Termination action is accomplished under the authority of section 102(c) of the National Security Act of 1947 quoted below: [Section 102(c), as above, here omitted]

4. POLICY

In order to meet the exacting responsibilities placed upon the Agency and pursuant to his statutory authority, the Director of Central Intelligence may separate any employee immediately when he deems it necessary or advisable in the interests of the United States. To the extent that is consistent with the interests of the United States, separations shall be effected on the basis of a thorough and impartial review of all pertinent information, favorable and unfavorable to the individual concerned.

* * * * *

6. RESPONSIBILITIES

a. * * *

Operating Officials and Heads of Career Services are responsible for continuously evaluating the performance and conduct of employees under their respective jurisdictions. They should advise employees of their shortcomings and warn them of the consequences of continued substandard performance or behavior.

b. * * *

Deputy Directors or Heads of Career Services are responsible for identifying personnel under their jurisdiction who should be considered for separation, and are responsible for reviewing each case with the Director of Per-

sonnel and recommending to the Director of Personnel separation of those individuals who, in their view, do not meet Agency standards on such bases as work performance, security or conduct.

c. * * *

The Director of Personnel is responsible for reviewing all pertinent information and for recommending appropriate action to the Director of Central Intelligence.

* * * * *

7. EMPLOYMENT REVIEW BOARD

The Director of Central Intelligence may appoint an Employment Review Board to advise him concerning any particular case.

STATEMENT

On January 30, 1961, petitioner received notice that his employment with the Central Intelligence Agency was terminated pursuant to the authority contained in Section 102(c) of the National Security Act of 1947, *supra*, p. 2. (R. 13.) The notice further stated that the termination would not affect petitioner's right to seek or accept employment in any other department or agency if declared eligible for such employment by the Civil Service Commission. (R. 13.)

Petitioner thereafter brought this action against respondent's predecessor, seeking a declaratory judgment that his separation was illegal and a mandatory injunction directing his restoration to his former position. (R. 2–7.) The gravamen of his complaint was that the separation was not effected in accordance with the applicable regulation, CIA Regulation

20–700, dated June 8, 1959, *supra*, pp. 2–4. (R. 2–7.)

In this connection, petitioner asserted that, in 1958, he had received an unsatisfactory performance rating and was thereupon informed that he was being separated under Section 102(c). (R. 4–5.) Following hearings, the Director decided in May, 1959, that petitioner should be transferred to another component of the Agency and that a final determination respecting petitioner's continued employment should be deferred pending the Director's personal review of a report of petitioner's performance to be rendered on April 30, 1960. (R. 5–6.)

The April, 1960, report stated that petitioner's overall performance was satisfactory but that his services were not needed and that there were no other suitable positions available in the Agency. (R. 6, 9.) Petitioner was offered a hearing, which was adjourned when petitioner refused to participate without being given more specific charges and the right to representation by counsel. (R. 6.) His separation ensued. (R. 6–7.)

Respondent moved for summary judgment or, in the alternative, for dismissal of the complaint (R. 8), on the basis of his personal affidavit, which recited, *inter alia:* (1) that he "thoroughly reviewed the case"; (2) that he determined that petitioner "was unsuitable for continued employment in the Central Intelligence Agency and deemed it necessary and advisable in the interests of the United States to terminate his employment"; (3) that "in accordance with authority vested in [him] as Director of Central Intelligence under section 102(c) of the National Security Act, as amended,

[he] directed on 27 January 1961 the termination of the employment of [petitioner] effective 30 January 1961"; (4) that the only administrative regulation of the Agency which implements section 102(c) is Regulation 20-700; (5) that an Employment Review Board was not appointed in this case. (R. 18–21.)

On July 27, 1961, the district court entered an order granting summary judgment to respondent. (R. 46.) On March 23, 1962, the Court of Appeals affirmed, *per curiam*. (R. 47–49.)

ARGUMENT

Further review of this case is not warranted. The petition presents no unsettled question of general importance, the decision below is clearly correct, and there is no conflict of decisions.

1. There is no merit to petitioner's contention that he was entitled to a full-dress hearing with confrontation of witnesses, specification of charges, counsel, and cross-examination, before being separated from the Central Intelligence Agency. Section 102(c) of the National Security Act, *supra*, p. 2, under which petitioner's employment was terminated, authorizes the C.I.A. Director, in his discretion, to discharge any Agency employee whenever he deems such discharge necessary or advisable in the interests of the United States. CIA Regulation 20–700, *supra*, pp. 2–4, implements this authority. It provides that the Director may, when he deems it necessary or advisable in the national interests, separate any Agency employee "immediately", but that, to the extent consistent with the national interests, there shall first be a review of all

pertinent information, favorable or unfavorable to the employee concerned.[1] Neither statute nor regulation provides for a hearing; neither mentions a hearing; and neither could, by any reasonable construction, be said to envisage a hearing.

Petitioner insists, however, that provision for a judicial-type hearing must be read into the statute and regulation if they are to pass constitutional scrutiny under the due process clause of the Fifth Amendment. In this he is mistaken. See *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886, 896; *Vitarelli* v. *Seaton*, 359 U.S. 535, 539; *Taylor and Marshall* v. *Beckham (No. 1)*, 178 U.S. 548, 575–578; *Keim* v. *United States*, 177 U.S. 290, 293–294; *Parsons* v. *United States*, 167 U.S. 324, 331–334; *Crowshaw* v. *United States*, 134 U.S. 99, 108; *In the Matter of Heaven*, 13 Pet. 230, 246, 259.

This was not, as the court of appeals correctly noted (Pet. App. 2a–3a), a termination for security reasons but for lack of suitability for positions and grades available within the Agency. There is no bar to employment by other agencies of government. Moreover, though not required by statute or regulation, petitioner was in fact accorded hearings and, on several occasions, availed himself of the opportunity for interviews with high Agency officials, including respondent's predecessor, regarding his employment

[1] This regulation superseded CIA Regulation 20-740 (dated November 1, 1954), which was involved in *George J. Rhodes* v. *United States*, a case now pending before this Court on petition for writ of certiorari (No. 224, this Term).

difficulties. (R. 19–20, 28–44.) In these circumstances, the procedures followed were clearly sufficient.

2. There is no substance to petitioner's contention that the district court erred in granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

a. Petitioner alleged that an Employment Review Board (see CIA Regulation 20–700(7), *supra*, p. 4) was appointed. (R. 4.) Respondent swore that he did not appoint such a Board. (R. 21.) The conflict, however, was only apparent since it was clear from the context that respondent spoke only with reference to the period from 1958 until petitioner's discharge in 1961, while petitioner was referring to the Board appointed in 1956 in connection with charges which resulted in his demotion at that time. (R. 4.) In any event, the issue is immaterial since Regulation 20–700 neither requires the Director to appoint an Employment Review Board nor to heed its advice if one is appointed.

b. Petitioner's complaint further alleged that respondent ordered his termination without reviewing the record. (R. 7.) Respondent, by sworn affidavit submitted in support of the motion for summary judgment, stated that he "personally reviewed the employment record" of petitioner and that he "thoroughly reviewed the case." (R. 19, 20.) Petitioner urges that he was entitled to cross-examine respondent before a trier of fact "to determine whether a good faith review, consistent with the regulations, was given." (Pet. 16.)

The presumption of validity which attaches to the formal recitations of public officials prevents the review requirement from becoming an issue in this case. The law does not countenance examination of a public officer in an attempt to impeach the veracity of his sworn statement, at least where, as here, there are no other allegations of collateral facts plainly indicating its falsity. *United States* v. *Morgan*, 313 U.S. 409, 422; *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board*, 291 F. 2d 354, 370 (C.A. 9), certiorari denied, 368 U.S. 890, rehearing denied, 368 U.S. 936; *Air Line Pilots Ass'n, Int'l.* v. *Quesada*, 286 F. 2d 319, 320 (C.A. 2), certiorari denied, 366 U.S. 962, rehearing denied, 368 U.S. 870; *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 695–696 (C.A. 9), certiorari denied, 338 U.S. 860, rehearing denied, 339 U.S. 945. See, also, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 226, 228.

The court there stated:

> Furthermore, we cannot allow the Administrator's recitation that he has personally examined and considered the evidence in making his decision to be successfully challenged by a mere allegation in a brief. We have neither moral nor legal right to presume that only those who occupy judicial office respect their obligations and perform their official duties honestly, sincerely, and conscientiously. Nor can we presume the subordinate personnel to be a camarilla. It requires more than a mere allegation (or affidavit on information and belief, which is not even found here) to upset the presumption of validity attaching to * * * the formal recitations of public officials.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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